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One Way Loans, LLC, d/b/a PowerLend

9 **UNITED STATES BANKRUPTCY COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION**

11 In re

12 ONE WAY LOANS, LLC, a California
13 limited liability company, d/b/a
14 POWERLEND,

15 Debtor.
16

Case No. 2:18-bk-24572-SK

Chapter 11

**EMERGENCY MOTION OF DEBTOR
AND DEBTOR IN POSSESSION FOR
INTERIM AND FINAL ORDERS
AUTHORIZING USE OF CASH
COLLATERAL; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

17 [11 U.S.C. §§ 363(a) and (c), 552(b); Fed. R.
18 Bankr. P. 4001(b); LBR 2081-1(a)(9) and
9075-1(a)]

19 [Declarations of David Redlener and Donald
20 A. Stukes, and Appendix of Exhibits for Cash
Collateral Motion filed separately]

21 Date: TO BE DETERMINED
22 Time: TO BE DETERMINED
23 Place: Courtroom 1575
24 255 East Temple Street
Los Angeles, CA 90012

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1 **TO THE HONORABLE SANDRA R. KLEIN, UNITED STATES BANKRUPTCY**
2 **JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, SECURED CREDITOR,**
3 **AND OTHER PARTIES IN INTEREST:**

4 **EMERGENCY MOTION**

5 One Way Loans, LLC, a California limited liability company, d/b/a PowerLend, debtor
6 and debtor in possession in the above-captioned case (the “Debtor”), pursuant to 11 U.S.C. §§
7 363(a), 363(c)(2), and 552(b)(1), Rule 4001(b) of the Federal Rules of Bankruptcy Procedure, and
8 Local Bankruptcy Rules 2081-1(a)(9) and 9075-1(a), hereby moves this Court for an interim
9 order and final order authorizing the Debtor’s use of cash collateral and other ancillary relief (the
10 “Motion”).

11 **INTRODUCTION AND NEED FOR RELIEF ON EMERGENCY BASIS**

12 On December 17, 2018 (the “Petition Date”), the Debtor commenced the above-captioned
13 bankruptcy case. The Debtor is a start-up company formed in April 2017 that provides personal
14 installment loans in the consumer loan market. It provides fast, flexible, and affordable loan
15 products to individuals in need of immediate cash. The Debtor’s goal is to bridge cash flow
16 shortages with industry-leading financial solutions that are both affordable to and in the best
17 interests of individuals while at the same time improve their credit.

18 The Debtor has one secured creditor, JGB Glenmachrie Ltd. a/k/a JGB (Cayman)
19 Glenmachrie Ltd. (“JGB Cayman”). Pre-petition, to allow the Debtor to begin its loan making
20 operations, the Debtor obtained a secured credit facility from JGB Cayman for up to \$30,125,000
21 (the “JGB Facility”) collateralized by assets having a combined value of approximately
22 \$14,600,000. This collateral includes, but is not limited to, a first priority lien on a 23-acre real
23 estate development property recently valued at \$12,100,000 owned by a third party entity (the
24 “Watermark Property”) and approximately \$2,500,000 in the Debtor’s loan receivables. JGB
25 Caymen, however, funded only \$5,125,000 under that facility and, despite being over-
26 collateralized, unreasonably refused to advance any additional funds under the JGB Facility. JGB
27 Caymen asserts that it is currently owed approximately \$6,198,402.78.

28 More recently, alleging certain defaults, JGB Cayman accelerated the loan and, on

1 November 13, 2018, purportedly through JGB Collateral, LLC, as collateral agent for JGB
2 Cayman (collectively with JGB Cayman and other JGB-affiliated entities, “JGB”), filed an action
3 in the Supreme Court of New York seeking monetary damages (the “State Court Action”). The
4 following day, JGB filed a motion for a preliminary injunction seeking, among other things, to
5 seize the Debtor’s bank accounts and loan receivables (the “Injunction Motion”). The hearing on
6 the Injunction Motion did not proceed in light of this bankruptcy filing.

7 JGB’s success on the Injunction Motion would have crippled the Debtor’s business, which
8 appears to have been JGB’s true objective from the start. It would have destroyed the Debtor’s
9 ability to service and collect its approximately \$1,900,000 of delinquent loans and reduce any
10 liability to JGB.

11 Furthermore, approximately \$70,000 of collections currently is being held in an account
12 owned by First Associates, the Debtor’s third party loan servicer, as a result of the disputes
13 between the Debtor and JGB. First Associates agreed to “freeze” its account in light of disputes
14 between the parties. As of the Petition Date, the Debtor does not have access to the approximately
15 \$70,000 in such account and, absent an order of this Court authorizing use of cash collateral, will
16 not have access to such cash or any additional funds deposited with First Associates (the “First
17 Associates Funds”).

18 As a result, in order to protect the Debtor and its creditors, the Debtor commenced this
19 reorganization case to provide it with an opportunity to restructure its debts. To achieve this goal,
20 the Debtor intends to obtain replacement DIP financing for additional working capital and to
21 payoff JGB. The Debtor has been actively seeking and exploring such financing options and is
22 confident it will have an acceptable term sheet from a proposed DIP lender for limited financing in
23 short order that, together with the use of cash collateral, will provide the Debtor with working
24 capital to fund operations until it secured financing to take out JGB.¹ As discussed below,

25
26 ¹ The Debtor’s financial advisor is reasonably confident that by mid-January 2019, the Debtor could secure
27 an acceptable term sheet for a further DIP loan in an amount sufficient to replace the JGB credit facility,
28 with the potential to close about 30 to 45 days thereafter.

1 however, out of an abundance of caution, to account for the possibility that the DIP financing
2 sought is not procured by the time currently contemplated or is otherwise not approved, the Debtor
3 prepared an alternate budget that still provides for the Debtor's cash-flow positive operations for
4 an eight-week period.

5 *The Debtor requires the uninterrupted use of cash collateral. With certain expenses*
6 *requiring the use of cash collateral due this week and each of the following budgeted weeks*
7 *thereafter, and given the upcoming holidays starting next week, during which the Court likely is*
8 *dark and parties may be unavailable, the Debtor seeks an emergency hearing on this Motion*
9 *this week (and, preferably, no later than this Thursday).*

10 If the Debtor loses the ability to access funds collected from its loan portfolios, including
11 the defaulting loan accounts, the Debtor would essentially be forced out of business. The Debtor
12 would be unable to service its loan portfolio, effectively implement collection efforts on
13 delinquent loans, pay employee wages, utilities, rent, and other operating expenses. In short, the
14 Debtor must have uninterrupted access to cash to continue operations.

15 With an asserted outstanding balance of approximately \$6,198,402.78² (the Debtor's total
16 secured debt), secured with collateral valued at approximately \$14,600,000, JGB enjoys an
17 enormous equity cushion of *no less than 57%*, which more than adequately protects its interest.
18 Moreover, on top of its equity cushion, JGB will be adequately protected by a combination of: (a)
19 the continued operation of the Debtor's business, including servicing and collecting on its loans
20 and consequent protection of JGB's interest in its collateral; (b) periodic adequate protection
21 payments as set forth in the Budget; and (c) to the extent JGB's lien is valid, enforceable,
22 properly-perfected, and unavoidable, replacement liens on post-petition receivables and proceeds
23 from existing loans to the extent of any diminution in value of JGB's collateral as a result of the
24 Debtor's cash collateral usage.

25
26
27 ² Nothing herein should be construed as the Debtor's concession to this asserted outstanding amount.
28

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RELIEF SOUGHT

Based on the foregoing, to avoid immediate and irreparable harm to the Debtor, the Debtor requires and seeks an interim order authorizing the use of cash collateral on an expedited basis, followed by a final order, pursuant to either a preferred proposed 15-week budget or, in the alternative, a proposed 8-week budget.

The Motion attaches to two alternate budgets. The first budget contemplates the Debtor's procurement of DIP financing in the total amount of \$3,000,000 in or about early January 2019, with the first draw in the sum of \$2,000,000, less gross loan and legal fees netting \$1,900,000, in early January 2019, with two subsequent draws of \$500,000 each in February and March 2019 (the "First Budget"). The First Budget is attached to the concurrently-filed Appendix of Exhibits in Support of Motion For Interim And Final Orders Authorizing Use of Cash Collateral (the "Appendix of Exhibits") as Exhibit 1. The second budget is an alternate cash collateral budget that does not contemplate the Debtor's procurement of such DIP financing by such time, and contemplates the Debtor's operations without DIP financing and based only on cash collateral for an approximate period of eight weeks (the "Alternate Budget," and together with the First Budget, the "Cash Collateral Budgets"). The Alternate Budget is attached to the Appendix of Exhibits as Exhibit 2. This Alternate Budget was prepared in the event the DIP financing is not procured by the time currently contemplated or is not otherwise approved by the Court at such time.³

More specifically, the Debtor requests that the Court: (a) permit the Debtor to use cash collateral to the extent necessary to avoid irreparable harm pending a final hearing in accordance with at least one of the Cash Collateral Budgets and the interim order on the Motion; (b) schedule a final hearing on this Motion under Rule 4001(b)(2); (c) following the final hearing, authorizing the Debtor to use cash collateral in order to pay its ordinary and necessary operating expenses and

³ The Debtor also requests some flexibility in connection with the Cash Collateral Budgets; namely, that the Debtor be permitted to exceed the disbursements forecasted in the Cash Collateral Budgets by up to 15% on a line-by-line basis and to exceed aggregate disbursements forecasted in the Cash Collateral Budgets by a total of 10%. The Debtor further requests that the balance of any unspent amounts on a weekly basis carry forward to be available to the Debtor in the following weeks.

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1 generally operate its business in accordance with the Cash Collateral Budgets on a final basis
2 pursuant to the First Budget or the Alternate Budget (depending on the circumstances), as may be
3 supplemented in advance of the final hearing, which budget would be deemed the “Final
4 Budget”;⁴ (d) grant the adequate protection described above, including the replacement liens (but
5 only to the extent that JGB’s security interests are valid, enforceable, properly-perfected, and
6 unavoidable, and the Debtor’s use of cash collateral results in diminution in the value of their cash
7 collateral.

8 The Debtor also requests that the order approving this Motion include a direction to: (i)
9 First Associates to release the First Associates Funds, which includes any funds it currently holds
10 and any funds that it collects in the future, to the Debtor; and (ii) all financial institutions with
11 which the Debtor has bank accounts to comply with the order on the Motion, and abide by the
12 Debtor’s direction as to the disbursement of its funds, even to the extent of any deposit account
13 control agreements, or “lock box” agreements, that may be in effect as of the Petition Date.

14 Absent an immediate hearing and entry of an order granting this Motion, the Debtor would
15 not have access to sufficient cash to pay ordinary and necessary expenses essential to continuing
16 its operations, which, in turn, would irreparably jeopardize the Debtor’s prospects for a successful
17 reorganization and/or its efforts to maximize the value of the Estate for the benefit of creditors.

18 This Motion is based upon these moving papers, the accompanying memorandum of points
19 and authorities, the concurrently-filed omnibus declaration of David Redlener (the “Redlener
20 Declaration”), the declaration of Donald A. Stukes (the “Stukes Declaration”), the record in this
21 case, the arguments and representations of counsel, and any other evidence or argument that may
22 be presented prior to or at the hearing on this Motion.

23 ///

24 ///

25 _____
26 ⁴ In the event the Debtor procures and seeks authority for DIP financing, the Debtor may supply an updated
27 or supplemental budget that accounts for such DIP financing depending on the particular terms and nature
28 of the DIP financing.

1 **WHEREFORE**, the Debtor respectfully requests that this Court: (1) grant the Motion; (2)
2 (2) authorize the Debtor's use of cash collateral as requested herein (including, but not limited to,
3 the release of the First Associates Funds); (3) enter an order authorizing such use of cash collateral
4 on a final basis; (4) enter an order authorizing such use of cash collateral on an interim basis
5 pending the final hearing (a proposed form of which is appended to the Appendix of Exhibits as
6 Exhibit 3) and entry of the final order on the Motion (a proposed form of which is appended to the
7 Appendix of Exhibits as Exhibit 4); (5) authorize the proposed forms of adequate protection; and
8 (6) provide such other and further relief as is proper.

9 Dated: December 18, 2018

SulmeyerKupetz
A Professional Corporation

11 By: /s/ Asa S. Hami
12 Asa S. Hami
13 Attorneys for Debtor and Debtor in Possession
14 One Way Loans, LLC, d/b/a PowerLend
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MEMORANDUM OF POINTS AND AUTHORITIES⁵

The Debtor hereby submits the following memorandum of points and authorities in support of the Motion.

I.

JURISDICTION AND VENUE

This Motion seeks authority to use cash collateral and related relief. This Court has jurisdiction to consider the Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (M) and (O). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. Pursuant to the Motion, the Debtor seeks authority to use cash collateral to pay its ordinary and necessary expenses, operate its business, and meet administrative expenses. The statutory predicates for the relief requested herein are 11 U.S.C. §§ 363(a), 363(c)(2), and 552(b)(1).

II.

FACTS

A. The Debtor, Its Management, And Summary of Business Operations

On December 17, 2018, the Debtor filed its voluntary petition for relief under chapter 11 of the Bankruptcy Code, commencing this case. The Debtor continues to operate its business and manage its affairs as a debtor in possession in this case.

The Debtor, a California limited liability company, dba PowerLend, was founded on April 11, 2017, in California. The Debtor operates an online subprime small-loan consumer finance business in the State of California. It provides fast, flexible, and affordable loan products to individuals in need of immediate cash. The Debtor's goal is to bridge cash flow shortages with industry-leading financial solutions that are both affordable to and in the best interest of individuals while at the same time improve their credit. The Debtor is licensed in California, Missouri, and Utah.

⁵ Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the motion to which this memorandum of points and authorities is appended.

1 The Debtor originated its first loan on February 6, 2018. The Debtor funded over 1,000
2 consumer loans in excess of \$2,800,000 during its first few months operations in 2018. The
3 Debtor also currently services approximately \$1,900,000 of delinquent loans.

4 The Debtor has the following founding members (the “Founder Members”): (1)
5 DCMRED, LLC (whose manager is David Redlener (“Redlener”)); (2) LME Capital LLC (whose
6 manager is Moses Gross); (3) JAAT Holdings, LLC (whose manager is Harinder Rana (“Rana”));
7 (4) Erika Harvel (“Harvel”); (5) Michael Silberman (“Silberman”); and (6) Jorge Aroche. The
8 Founder Members hold membership interests in the Debtor ranging from 1.00% to 45.00%, except
9 that Harvel no longer holds a membership interest in the Debtor. In addition, as of on or about
10 August 31, 2018, Doolster Holdings, LLC, obtained a 5.00% membership interest (both economic
11 and voting) in the Debtor.

12 The Debtor also currently has the following limited members (the “Limited Members”):
13 (1) JGB Claggain Bay, Inc., a JGB affiliate; (2) BRNB, LLC; (3) Sherbrooke Holdings LLC; and
14 (4) Present Media Group, Inc. The Limited Members also hold minority membership interests in
15 the Debtor, with JGB Claggain Bay, Inc., holding a membership interest of 9.99%.⁶

16 Redlener serves as the Debtor’s Chief Executive Officer. Silberman serves as the Debtor’s
17 President, Chief Financial Officer, and Secretary, with Harvel serving as its Chief Operating
18 Officer. The Debtor also had a Board of Directors consisting of Redlener, Silberman, Harvel,
19 Rana, and Brad Powers.

20 As of the Petition Date, the Debtor has 12 employees (among which includes Redlener,
21 Silberman, Rana, and Harvel). The most recent payday was November 15, 2018, at which only
22 six employees were paid (and, given the tight cash position of the Debtor, only a percentage of the
23 total amount due), with the next contemplated payday not until January 4, 2018. Payroll for
24 certain employees is on a monthly basis, and semi-monthly for other employees. The average

25
26 ⁶ Subsequent to the Debtor’s First Revised Operating Agreement, a series of documented equity transfers
27 have occurred but not yet incorporated into a Second Revised Operating Agreement, under which the
28 equity ownership interests of BRNB, LLC, and Present Media Group, Inc., were converted to profit sharing
interests.

1 amount the Debtor needs for any given monthly payroll period in the ordinary course of business
2 is approximately \$67,033 (wages only and not including benefits or employer taxes). The average
3 amount the Debtor needs for any given semi-monthly payroll period in the ordinary course of
4 business is approximately \$21,018 (wages only and not including benefits or employer taxes).
5 The Debtor also offers various employee benefits, including, for example, medical, vision, dental
6 insurance, and parking.

7 A more detailed discussion of the Debtor's employee wage obligations, employee benefits,
8 and other related information is included in the concurrently-filed "first day" motion to authorize
9 payment of certain pre-petition wages and maintenance of employee benefit programs.

10 **B. Recent Financial Results**

11 To date, the Debtor has funded its activities largely through debt financings. Based on the
12 most recent financial statements, for the nine months ended September 30, 2018, the Debtor
13 generated revenues in the aggregate of approximately \$1,676,122. Expenses during that time
14 totaled approximately \$1,986,588, which includes operating expenses in the sum of approximately
15 \$1,009,376, and interest and other expenses in the sum of approximately \$977,212. The Debtor's
16 cash at July 31, 2018, August 31, 2018 and September 30, 2018, totaled approximately \$197,657,
17 \$140,821, and \$114,635, respectively.

18 The Debtor's management believes that the Debtor's cash, collections on its active and
19 recovery portfolios, equity investment and additional debt offerings will provide for adequate
20 liquidity.

21 **C. Servicing And Collection of Loan Portfolio And Cash Management System**

22 The Debtor's active loan accounts are serviced by a third-party servicer, First Associates,
23 where regular consumer payments from these loans are deposited into an account in the Debtor's
24 name at Preferred Bank. This account is designated in a Deposit Account Control Agreement with
25 JGB (the "DACA") as the "Collection Account." JGB has the right to sweep this bank account
26 pursuant to the terms of the DACA upon an event of default. Defaulted or "de-boarded" customer
27 loan accounts are serviced by the Debtor's in-house collection team.

28 The Debtor maintains the following accounts at Preferred Bank to conduct business:

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1 Collections Account, Operating Account, Funding Account and the Payroll Account. Pre-petition,
2 the Debtor employed the following cash management system with respect to payments processed
3 by First Associates: (i) payments from the Debtor's borrowers are deposited into a First Associates
4 bank account; (ii) First Associates then transfers the funds to the Collection Account (less a
5 service fee); and (iii) the Debtor subsequently transfers those funds to its Operating Account on a
6 daily basis to pay the Debtor's operating (Operating Account), loan origination (Funding
7 Account), payroll (Payroll Account), and other business related costs. Excess funds, if any, would
8 be used for new loan originations.

9 The Debtor utilizes a third-party ACH provider to disburse loan proceeds directly to new
10 borrowers. In order to fund this ACH provider, the Debtor transfers cash from the Operating
11 Account to the Funding Account and from the Funding Account directly to the ACH provider.

12 The Debtor also utilizes a third-party payroll provider to pay its employees. When paying
13 its employees, the Debtor transfers cash from the Operating Account to the Payroll Account from
14 which the third-party payroll provider drafts the amount necessary to process payroll checks. In
15 addition to these primary accounts, the Debtor maintains a fifth account that holds \$75,107.44.
16 This cash supports a Letter of Credit for the benefit of the Debtor's primary landlord. The Debtor
17 has no control over this account. All these accounts are at Preferred Bank.

18 Aside from payments processed through First Associates, the Debtor also receives loan
19 payments from non-performing borrowers directly through the efforts of the Debtor's in-house
20 collections team vis-à-vis ACH, or check, which payments previously were deposited directly into
21 the Debtor's operating account.

22 As disputes between the Debtor and JGB escalated (discussed in more detail below and
23 the concurrently-filed Redlener Declaration), the Debtor had consumer receivables collected by
24 First Associates and payments made on account of delinquent loans deposited into a bank account
25 held by DCMRED, LLC (one of the Debtor's Founder Members) (also at Preferred Bank). This
26 was done to ensure the Debtor would have the ability to continue operations, service its loan
27 portfolio, and have a stream of revenue to pay limited salaries and collections on defaulting loans
28 and preserve the collateral upon which JGB had a security interest, which the Debtor was

1 servicing in-house.

2 The limited revenues collected by the Debtor in-house are used to pay for ongoing
3 collection efforts, minimal staffing, utilities and other essential business requirements necessary to
4 prevent further deterioration of the loan portfolio.⁷ These funds also permit the Debtor to continue
5 to service these loans.

6 First Associates currently holds in an account approximately \$70,000 and is expected to
7 receive between \$10,000 to \$25,000 per week in cash remittances received on behalf of the
8 Debtor. In light of such disputes, First Associates has agreed to “freeze” that account, and will not
9 release any of the funds it currently holds or will receive, pending further instructions from the
10 parties or order of court.

11 The Debtor authorized First Associates to provide JGB with full access to the loan
12 portfolio and cash remittance data for the loans that it was servicing on behalf of the Debtor
13 through an internet portal, upon JGB’s request. Since the outset, the Debtor and JGB
14 communicated by email and telephone regularly concerning weekly and monthly cash and loan
15 reports, First Associates portfolio remittances, financial statements, bank statements, and other
16 loan portfolio matters.

17 The consumer loan payment receivables that have been collected and are presently in the
18 possession of First Associates are secure and fully accounted for. As set forth above, JGB has
19 access to this information and has firsthand knowledge of the funds on account with First
20 Associates through the internet portal.

21 **D. The Debtor’s Assets**

22 As of the Petition Date, the Debtor had total assets valued at approximately \$5,500,000.
23 The Debtor’s primary asset is its loan receivables in the approximate amount of \$2,500,000. The
24 Debtor’s other assets deferred marketing expenses of approximately \$2,141,538 and other prepaid
25 expenses and assets in the aggregate of approximately \$179,265, as well as intangibles, equipment

26 _____
27 ⁷ It should be noted that the Debtor’s Loan Agreement with JGB allows for the payment of salaries, even
28 upon an event of default as “Permitted Compensation.”

1 and cash.

2 **E. The Debtor's Liabilities**

3 The Debtor has estimated liabilities in the aggregate of approximately \$5,800,000.

4 This includes: (a) JGB's secured debt in the principal amount of \$5,125,000 (although JGB
5 currently claims the total outstanding amount due is approximately \$6,198,402.78), the only
6 amount JGB ultimately advanced under the \$30,000,000 JGB Facility; (b) an unsecured note in
7 the principal amount of \$1,700,000 in favor of P&G Holdings, LLC/Moses Gross (one of the
8 Debtor's Founder Members) provided as part of P&G Holding's agreement to pledge the
9 Watermark Property as collateral for the JGB Facility; (c) two unsecured working capital loans,
10 each in the amount of \$100,000, one from Jorge Aroche and another from Silberman; and (d)
11 unsecured trade payables in the aggregate of approximately \$256,907.00.

12 **F. The JGB Loan And Related Disputes**

13 **1. Background**

14 Around the time the Debtor was created, it entered negotiations with JGB, who agreed to
15 provide the Debtor an initial credit facility in the amount of \$30,125,000.00. A true and correct
16 copy of the loan Term Sheet issued by "JGB Management Inc." is attached to the Appendix of
17 Exhibits as Exhibit 5.

18 The JGB Facility was supposed to allow the Debtor to begin its loan making operations,
19 with a requirement that JGB Claggain Bay, Inc. (presumably another JGB affiliate) become a
20 9.99% percent equity (limited) partner and part owner of the Debtor. A true and correct copy of
21 the Limited Liability Company Agreement for the Debtor, dated December 1, 2017, evidencing
22 JGB's 9.99% equity interest is attached to the Appendix of Exhibits as Exhibit 6. The JGB Term
23 Sheet memorialized the parties' understandings and responsibilities and was executed by JGB
24 Management Inc. and the Debtor on November 6, 2017. *See* Exhibit 5.

25 Thereafter, the loan agreement was processed, loan documents were executed by email in
26 piecemeal by the parties, and the closing completed on December 1, 2017.

27 **2. The JGB Loan Documents And Collateral**

28 The loan arrangement between the parties included numerous forms of collateral

1 demanded by JGB to secure its interests, including a first priority lien on the 23-acre Watermark
2 Property recently valued at \$12.1 million. This collateral alone far exceeds the \$5,125,000.00
3 advance JGB made to the Debtor, as it was given in reliance of JGB's promise to provide
4 additional capital. JGB also took an equity interest and became a 9.99% member of the Debtor.
5 This is in addition to guaranties, pledges and other collateral JGB took to secure the JGB Facility.

6 The loan documents and collateral include: (a) Promissory Note in the sum of
7 \$30,125,000.00 in favor of JGB Cayman; and (b) Loan and Security Agreement (the "Loan
8 Agreement") in favor of JGB Collateral, LLC, as collateral Agent for JGB Cayman, granting JGB
9 a security interest in substantially all of the Debtor's assets, including, but not limited to, its loan
10 portfolio. True and correct copies of the Promissory Note and Loan Agreement are attached to the
11 Appendix of Exhibits as Exhibit 7 and Exhibit 8, respectively.

12 The JGB Facility was secured by an extensive array of documents and diverse collateral
13 aside from substantially all of the Debtor's assets (the "Additional Collateral") including the
14 following (collectively with the Note and Loan Agreement, the "Loan Documents"):

- 15 • Guaranty Agreement executed by each of: (i) Redlener; (ii) DCMRED, LLC; (iii)
16 Harvel; (iv) Rana; (v) JAAT Holdings, LLC; and (vi) Silberman.
- 17 • Pledge Agreement executed by each of: (i) DCMRED; (ii) Harvel; (iii) JAAT Holdings;
18 and (iv) Silberman.
- 19 • Numerous UCC-1 filings filed against the following parties in either California,
20 Delaware, or New York: (i) the Debtor; (ii) Harvel; (iii) Silberman; (iv) DCMRED; and
21 (v) JAAT Holdings.
- 22 • Four separate mortgages securing the approximately 23-acre Watermark Property
23 owned by P&G Holdings LLC, d/b/a P&G Holdings NY LLC, and located in
24 Muskegon, Michigan, having a fair market value of \$12,100,000.00 pursuant to a June
25 26, 2018 appraisal prepared by Colliers International. A true and correct copy of this
26 appraisal is attached to the Appendix of Exhibits as Exhibit 9. True and correct copies
27 of the mortgage filings against the Watermark Property are attached to the Appendix of
28 Exhibits, collectively, as Exhibit 10.
- A new Limited Liability Company Agreement for the Debtor (drafted by JGB's
counsel) granting JGB Claggain Bay, Inc., a JGB affiliate, a 9.99% limited interest in
the Debtor.
- A Deposit Account Control Agreement.

1 The loan closed on December 1, 2017. The total closing costs paid equaled \$428,076.00
2 (based on a loan of \$5,125,000.00), with JGB's legal fees alone totaling more than 20% of this
3 amount. Closing costs included a payment for legal fees to JGB's attorneys in the sum of
4 \$79,500.00, and another legal fee of \$10,000.00 to another set of counsel for JGB to prepare the
5 four mortgages encumbering the Watermark Property. As a result, the \$5,125,000 advanced
6 yielded working capital of only \$4,696,924.00 for the Debtor. A true and correct copy of the
7 closing statement for the JGB Loan ("Flow of Funds Memorandum") is attached to the Appendix
8 of Exhibits as Exhibit 11.⁸

9 The Debtor now services over 1,000 consumer loans it originated. These loans in the
10 Debtor's portfolio are also collateral under the Loan Agreement.

11 **3. The Debtor's Compliance With its Loan Obligations to JGB**

12 The Debtor made nine monthly interest payments, of approximately \$79,000 each, totaling
13 \$702,122 at the rate of 18% per annum to JGB. The first interest payment was on December 27,
14 2017, and the last on September 5, 2018.

15 Contrary to allegations JGB has made in the State Court Action, the Debtor complied with
16 its reporting obligations to JGB and otherwise supplied it with substantial information on a regular
17 basis. The Debtor provided JGB with monthly financial reports, cash reports, monthly and weekly
18 collateral reports for active accounts on a regular basis, and later on, information on delinquent
19 accounts and on-going collection efforts.

20 JGB also was given full access to the First Associates loan report portal providing full
21 access to loan reports related to the Debtor loan portfolio with First Associates immediately upon
22 JGB's request.

23 From the start, the Debtor also provided JGB access to the online bank accounts. Attached
24 to the Appendix of Exhibits as Exhibit 12 is a true and correct copy of an email dated February 2,

25
26 ⁸ On information and belief, JGB did not acquire the Lender's Environmental Liability Insurance policy
27 despite holding back \$40,000 for that purpose from the loan proceeds, contrary to the parties' loan
28 agreement. See Exhibit 11.

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2018, confirming this arrangement and JGB's acknowledgment of having access to the Preferred Bank online account. The Debtor was in constant communication with JGB throughout 2018, and most importantly, even after the last submission of monthly reports on August 9, 2018. Communications from August 10, 2018, through the date of default did not pertain to the delivery of loan portfolio reports generated by the Debtor. The post-August 9 communications were primarily discussions regarding release of the loan receivables for the purpose of securing additional financing, as well as terms of a JGB payoff.

At no time was the Debtor made aware of any mention made by JGB regarding any lack of reporting or reports or any request for same that went unanswered. JGB has all of the Debtor's principals' contact information, including emails, office and mobile telephone numbers. Notwithstanding the foregoing, there may have been one occasion where JGB contacted the Debtor to transmit reports, which was immediately complied with and transmitted to JGB.

Upon request in November 2018, JGB was also granted access to the First Associates internet portal repository for all loan reports related to the Debtor's loan portfolio. Once JGB had gained access to the bank account and the internet portal repository, it was redundant, repetitive, and unnecessary for the Debtor to keep forwarding the same financial reports and loan portfolio information to which JGB already had full access.

4. JGB's Refusal to Advance Additional Capital And Other Acts of Bad Faith

Pursuant to the terms of the Loan Agreement, it was further agreed and understood that JGB would continue to fund the Debtor's loan operations on a regular basis, with up to an additional \$25,000,000.00 in capital, provided that certain goals and performance markers were met, including making interest payments of approximately \$79,000.00 per month to JGB, which were duly made. This promise was a material term upon which the Debtor relied when entering into the loan arrangement and providing the Additional Collateral.

However, JGB then only funded \$5,125,000 under that JGB Facility, refused to provide additional capital funds. This left the Debtor with a limited amount of working capital and affected its ability to generate new loans. After JGB refused to advance additional capital, the Debtor sought a release of lien on the loan portfolio so it could access other credit facilities and

1 pay off JGB. This request was unreasonably denied, thereby further hampering the Debtor's
2 ability to initiate new loans and conduct business. Numerous efforts were made by the Debtor to
3 sustain and grow the business.

4 In March 2018, the Debtor was offered a tremendous opportunity to finance and defer
5 marketing and lead generation costs utilizing a subordinated credit line. In that these are the
6 perhaps the most significant line item expenses, it was an opportunity to enhance cash flow,
7 maintain JGB's cash requirements, and allow for increased loan origination. However, JGB
8 would not consent to this subordinated credit line.

9 In July 2018, after hitting every monthly loan origination target and just 45-60 days from
10 being both cash-flow positive and profitable, the Debtor requested an additional advance under its
11 \$30 million Credit Facility. Despite having excellent collateral coverage from the 23-acre
12 Watermark Property with a loan to value ratio of less than 50%, and owning 9.99% of the Debtor,
13 JGB still refused to provide a further advance.

14 At the time JGB stopped advancing capital necessary to fund the Debtor's ongoing
15 business operations, it devastated the Debtor's ability to initiate new loans. As a result, the Debtor
16 was unable to initiate any new loans since June 2018, with the exception of two loans in July and
17 one loan in August 2018.

18 On or about September 18, 2018, JGB suddenly demanded a "redemption" payment in the
19 amount of \$150,000.00 to be paid on or before September 20, 2018, just two days later. A true
20 and correct copy of JGB's redemption notice is attached to the Appendix of Exhibits as Exhibit
21 13. This demand was made in bad faith and was yet another action taken by JGB in the pursuit of
22 its predatory strategy to cripple the Debtor's cash flow and ongoing business operations.

23 In addition, as discussed below, in September 2018 (and many times prior and subsequent
24 thereto), the Debtor sought financing from credit facilities that would leverage our existing loan
25 portfolio. As discussed below, although the Debtor kept JGB informed throughout this process,
26 received term sheets from two facilities, JGB's excellent collateral coverage, and the Debtor's
27 offer to pay \$550,000, JGB refused to release the loan portfolio.

28 Based on JGB's actions described above, it became clear that JGB was not acting in the

1 best interest of the Debtor. As such, the Debtor's managing member, DCMRED LLC, took
2 measures to protect the Debtor and curtail the deterioration of collateral. More specifically, the
3 consumer receivables collected by First Associates on behalf of the Debtor were deposited into a
4 bank account at Preferred Bank held by DCMRED. This was done to ensure the Debtor would
5 have the ability to continue operations, service its loan portfolio, and have a stream of revenue to
6 pay limited salaries and collections on defaulting loans which the Debtor was servicing in-house.

7 **5. JGB's Declared Defaults And Commencement of Litigation**

8 On or about October 8, 2018, JGB defaulted the Debtor for a litany of alleged defaults,
9 citing, among other things, noncompliance with the terms of the Loan Agreement and failure to
10 provide information to JGB (which was false as described above).

11 On or about October 10, 2018, JGB issued an acceleration notice to the Debtor. A true and
12 correct copy of the acceleration notice is attached to the Appendix of Exhibits as Exhibit 14.

13 On November 13, 2018, JGB commenced the State Court Action against the Debtor. In
14 that action, JGB seeks monetary compensation. JGB concurrently filed the Injunction Motion
15 seeking, among other things, to seize the Debtor's bank accounts and, in the process, shut down
16 the Debtor's operations. The hearing on the Injunction Motion did not proceed in light of
17 commencement of this bankruptcy case.

18 At or about the same time as the State Court Action against the Debtor was filed, JGB
19 commenced a second action in the Supreme Court of New York pertaining to the same loan
20 arrangement and \$30,125,000.00 Credit Facility against the guarantors of the Loan.

21 **6. Harmful Impact of JGB's Conduct on The Debtor's Operations**

22 JGB's refusal to advance additional capital, consent to Debtor friendly/subordinated
23 financing and its draconian refusal of allowing the Debtor to utilize its existing loan portfolio to
24 secure additional financing devastated the Debtor's ability to initiate new loans. As a result, as
25 noted above, the Debtor has been unable to originate any new loans since June 2018, except for
26 two loans in July and one in August 2018. Despite JGB's bad faith and course of conduct, the
27 Debtor made nine interest payments totaling \$702,122, with the last payment on September 5,
28 2018.

1 Although the Debtor ceased originating new loans and reduced its staffing, it did not cease
2 operating. The Debtor continued its efforts to collect on its non-performing loan portfolio to
3 preserve the value of JGB's collateral.

4 Furthermore, as discussed below, the Debtor's inability to access and use cash collateral,
5 including the First Associates Funds, will force the Debtor out of business.

6 **G. Factors Precipitating Chapter 11 Filing**

7 As discussed above, JGB's refusal to advance any additional funding under the Credit
8 Facility, and its refusal to release its lien on the Debtor's loan receivables to permit the Debtor to
9 obtain additional financing, significantly impeded the Debtor's cash flow position. Moreover, as
10 discussed above, in light of the escalating disputes between the Debtor and JGB, the Debtor no
11 longer had access to the First Associates Funds.

12 More recently, JGB commenced the State Court Action against the Debtor and sought a
13 preliminary injunction, among other things, to seize the Debtor's bank accounts and access the
14 First Associates Funds. A hearing on the Injunction Motion was set for December 17, 2018.

15 If the Debtor lost the ability to access any funds collected from its loan portfolios,
16 including the defaulting loan accounts and would have been ordered to transfer all of these funds
17 to JGB, the Debtor will essentially be forced out of business. The Debtor relies on the consumer
18 receivables for operating expenses including servicing the active loan portfolio with First
19 Associates.

20 To avoid this potential risk and the consequential disastrous results to the interests of the
21 Debtor and its creditors (including its secured creditor, JGB) if JGB were successful on the
22 Injunction Motion, the Debtor commenced this case to protect the interests of the Debtor and its
23 creditors with the goal of achieving a successful reorganization.

24 **H. The Debtor's Restructuring Goals**

25 The Debtor believes that with adequate working capital it could be cash flow positive in
26 short order. In fact, in July 2018, the Debtor was just 45-60 days from being both cash flow
27 positive and profitable (but that achievement was thwarted when JGB denied an additional
28 advance under the JGB Facility).

1 Pre-petition, the Debtor consistently sought financing from credit facilities that would
2 leverage its existing loan portfolio. Throughout this period, the Debtor transmitted emails to JGB
3 advising it of the Debtor's efforts to secure financing, including providing it with prospective
4 lender names and the loan details in a showing of good faith to comply with its repayment
5 obligations and remain open for business. Ultimately, the Debtor received term sheets from two
6 facilities, both requiring a first priority UCC lien on the loan portfolio. However, despite excellent
7 collateral coverage from the Watermark Property *and* the Debtor's offer to pay \$550,000 for the
8 release of the loan portfolio, JGB refused to release the loan portfolio. A true and correct copy of
9 a July 12, 2018, e-mail from the Debtor to JGB concerning these financing efforts is attached to
10 the Appendix of Exhibits as Exhibit 15.

11 Notwithstanding JGB's posture, the Debtor continued with its efforts to procure financing
12 to obtain additional working capital and/or to payoff and replace the JGB Facility. As set forth in
13 the First Budget and the concurrently-filed Redlener Declaration and Stukes Declaration, at this
14 point, the Debtor is confident it will have an acceptable term sheet for an initial DIP financing loan
15 from a lender for approximately \$1,900,000 (net) to be funded no later than early January,
16 followed by a second and third tranche of \$500,000 each in or about February and March. Based
17 on ongoing discussions with lenders, the Debtor further believes that, by mid-January 2019, the
18 Debtor could secure an acceptable term sheet for a further DIP loan from this or another lender in
19 an amount sufficient to replace the JGB Facility, with the potential to close about 30 to 45 days
20 thereafter, and which will put the Debtor in a position to successfully reorganize its debts and
21 emerge from this case a viable going concern. The Debtor anticipates filing a motion to approve
22 the initial DIP loan concurrently with the present motion or in the very near future.

23 In the event the Debtor is unable to procure the DIP Financing as currently contemplated,
24 the Debtor will continue to seek financing to satisfy the existing JBG outstanding loan via a new
25 credit facility, in addition to funding to be made available to underwrite new loans consistent with
26 the business mandate. Further, efforts will be made to identify a suitable equity partner to provide
27 additional capital to support business operations. The Debtor's proposed Alternate Budget
28 provides for the Debtor to continue operations by paying its employees, its key vendors, its

1 required insurances, office lease and necessary administrative fees, until a new credit facility can
2 be secured. Such facility could serve as the basis for a proposed Reorganization Plan leading to
3 the exit from Chapter 11.

4 **III.**

5 **SCOPE OF REQUEST FOR USE OF CASH COLLATERAL AND PROPOSED**
6 **ADEQUATE PROTECTION**

7 **A. The Cash Collateral Budgets And Their Approval**

8 Attached to the Appendix of Exhibits as Exhibit 1 and Exhibit 2 are the Debtor's two
9 proposed cash collateral/operating budgets. Both Cash Collateral Budgets were prepared by the
10 Debtor with the assistance of the Debtor's outside financial consultant Donald A. Stukes of ASI
11 Advisors, LLC. *See* Stukes Declaration. The Cash Collateral Budgets were reviewed and
12 approved by Redlener (the Debtor's CEO). *See* Redlener Declaration.

13 The First Budget contemplates the Debtor's procurement of DIP financing in the total
14 amount of \$3,000,000 in or about early January 2019, with the first draw in the sum of
15 \$2,000,000, less gross loan and legal fees netting \$1,900,000, in early January 2019, with two
16 subsequent draws of \$500,000 each in February and March 2019. The First Budget extends for 15
17 weeks, and provides for periodic adequate protection payments to JGB, and includes line items for
18 the Debtor's administrative professional fees.

19 The Alternate Budget is an alternate cash collateral budget that does not contemplate the
20 Debtor's procurement of such DIP financing by such time, and contemplates the Debtor's
21 operations without DIP financing and based only on cash collateral for an approximate period of
22 eight weeks. This Alternate Budget was prepared in the event the DIP financing is not procured
23 by the time currently contemplated or is not otherwise approved by the Court at such time.

24 The Debtor requests authority to use cash collateral in accordance with the Cash Collateral
25 Budgets. More specifically, the Debtor requests (i) pending a final hearing, emergency authority
26 to use cash collateral on an interim basis to satisfy post-petition administrative expenses and
27 operational expenses (including, for example, the payment of rent, costs of servicing loans, and
28 pre and post-petition wages) in accordance with the First Budget or the Alternate Budget, and

(ii) at the final hearing, set not less than 14 days after the interim hearing, final authority to use cash collateral pursuant to the First Budget or the Alternate Budget (depending on the circumstances), as may be supplemented in advance of the final hearing, which budget would be the Final Budget.⁹

The Cash Collateral Budgets were prepared based upon historical assumptions of the Debtor's business activity on its performing loans and collection history on its non-performing loans. As noted above, the rationale for the First Budget is based upon securing debtor-in-possession financing to provide interim cash liquidity to operate the business, underwrite and place new loans, and provide adequate protection payments to the senior lender post-petition. With the ability to continue operations, the Debtor contemporaneously will be seeking a new senior credit facility that be secured as a take-out of the current debt of JGB, which has an encumbrance on a development project called Watermark owned by a minority owner in the Debtor named Moses Gross. Post-petition operational expenses are based upon current service contracts, payroll based upon employee compensation agreements, and adequate protection payments identified in the First Budget are based upon the current loan agreement terms.

The rationale for the Alternate Budget is based upon the Debtor not obtaining approval for a DIP loan in the first 8-week period post-petition, but the Debtor will contemporaneously seek financing to satisfy the existing JBG outstanding loan via a new credit facility, in addition to funding to be made available to underwrite new loans consistent with the business mandate. Further, efforts will be made to identify a suitable equity partner to provide additional capital to support business operations. The Alternate Budget provides for the Debtor to continue operations by paying its employees, its key vendors, its required insurances, office lease and necessary administrative fees, until a new credit facility can be secured.

In addition to various categories of general operating expenses, including payments on the

⁹ In the event the Debtor procures and seeks authority for DIP financing, the Debtor may supply an updated or supplemental budget that accounts for such DIP financing depending on the particular terms and nature of the DIP financing.

Debtor's office space lease, both Cash Collateral Budgets contain line items for U.S. Trustee fees. As the Cash Collateral Budgets reflect, based on the assumptions underlying the Cash Collateral Budgets, the Debtor will be able to operate post-petition with the use of cash collateral on a cash flow positive basis through the period covered by the respective budgets.

All payments described in the Budget are necessary to maintain and continue the Debtor's operations and to maximize the value of the Estate. Failure to make payment in accordance with the Cash Collateral Budgets could result in immediate and irreparable harm to the Debtor's operations, the value of the Estate, and the interests of creditors.

In summary, the Cash Collateral Budgets reflect that, with the anticipated DIP financing and funds generated from operations, the Debtor will be able to meet operating and administrative expenses for at least the next 15 weeks, and would be able to operate without the currently contemplated DIP Financing, if necessary, for at least the next eight weeks. Further, the Debtor believes that the Cash Collateral Budgets and the assumptions underlying the budgets are reasonable and appropriate under the circumstances.

B. Limited Flexibility in Budget And Carryover of Excess Cash

The Debtor also requests some flexibility in connection with the Cash Collateral Budgets such that the Debtor may exceed the disbursements forecasted in the Cash Collateral Budgets by up to 15% on a line-by-line basis, and to exceed aggregate disbursements forecasted in the Cash Collateral Budgets by a total of 10%.

Further, the Debtor requests that, to the extent any amount in a disbursement category is unused during a particular period, that amount be preserved and available for use in any subsequent period. *See* Exhibit 3 (Proposed Interim Order); Exhibit 4 (Proposed Final Order).

C. The Debtor's Need For Cash Collateral

The Debtor's use of cash collateral as set forth in the Cash Collateral Budgets is necessary in order to allow the Debtor to move forward with its contemplated reorganization. As discussed above, the Debtor's uninterrupted access to cash is critical to maintaining operations. The Debtor relies on the consumer receivables for operating expenses, including servicing the active loan portfolio with First Associates.

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1 In light of JGB's excessive collateral coverage, it would be more beneficial and equitable
2 if the entirety of the First Associates Funds were released to the Debtor so that it can more
3 effectively service its loan portfolio, including the non-performing loan portfolio. Due to
4 extremely tight cash flow, the Debtor does not have the resources to maximize collection efforts
5 on its \$1.9 million non-performing loan portfolio absent release of those funds and use of cash
6 collateral.

7 If the Debtor is not permitted to access any funds collected from its loan portfolios,
8 including the defaulting loan accounts, or the First Associates Funds (those currently held and
9 future collections) are not released to the Debtor, the Debtor will essentially be forced out of
10 business. This is especially true if the Debtor is unable to obtain the DIP financing as currently
11 contemplated and is not able to use cash collateral. Therefore, absent an immediate hearing and
12 entry of an order granting this Motion, the Debtor would not have access to sufficient cash to pay
13 ordinary and necessary expenses essential to continuing its operations, which, in turn, would
14 irreparably jeopardize the Debtor's prospects for a successful reorganization and/or its efforts to
15 maximize the value of the Estate for the benefit of creditors.

16 **D. Proposed Adequate Protection**

17 JGB is more than adequately protected by its security interests and the abundant and
18 diverse sources of collateral securing the loan. With an asserted outstanding balance of
19 approximately \$6,198,402.78¹⁰ (the Debtor's total secured debt), secured with collateral valued at
20 approximately \$14,600,000 (\$12.1 million in Watermark Property and approximately \$2.5 million
21 in loan receivables), JGB enjoys an enormous equity cushion that adequately protects its interest
22 in any cash collateral. Indeed, JGB is over collateralized for its loan and it faces absolutely no risk
23 from the Debtor's use of cash collateral.

24 Moreover, JGB will be further protected by a combination of: (a) the continued operation
25 of the Debtor's business, including servicing and collecting on its loans and consequent reduction
26

27 ¹⁰ Nothing herein should be construed as the Debtor's concession to this asserted outstanding amount.
28

1 of JGB's outstanding debt, which will preserve the value of JGB's collateral; (b) periodic adequate
2 protection payments to JGB as set forth in the First Budget (assuming DIP Financing is procured
3 as reflected in the First Budget); and (c) replacement liens on receivables and proceeds received
4 post-petition from existing loans to extent that: (i) the pre-petition security interest of JGB is valid,
5 enforceable, properly perfected, and unavoidable; and (ii) the Debtor's use of cash collateral
6 results in diminution in the value of JGB's collateral.

7 **IV.**

8 **THIS COURT SHOULD GRANT THE MOTION AND AUTHORIZE THE DEBTOR'S**
9 **USE OF CASH COLLATERAL**

10 **A. Section 363 of The Bankruptcy Code Authorizes The Use of Cash Collateral**

11 Section 363 of the Bankruptcy Code governs the Debtor's use of property of its estate.

12 Section 363(c)(1) provides in pertinent part that:

13 If the business of the debtor is authorized to be operated under
14 section . . . 1108 . . . and unless the court orders otherwise, the
15 trustee may enter into transactions, including the sale or lease of
16 property of the estate, in the ordinary course of business, without
17 notice or a hearing, and may use property of the estate in the
18 ordinary course of business without notice or a hearing.

19 11 U.S.C. § 363(c)(1).

20 A debtor in possession has all the rights and powers of a trustee with respect to property of
21 the estate, including the right to use property of the estate in compliance with section 363 of the
22 Code. *See* 11 U.S.C. § 1107(a). Section 363(c)(2) establishes a special requirement with respect
23 to "cash collateral," by providing that the trustee or debtor in possession may not use, sell or lease
24 "cash collateral" under subsection (c)(1) unless (i) such entity that has an interest in such collateral
25 consents, or (ii) the court, after notice and a hearing, authorizes such use, sale or lease.

26 "Cash collateral" is defined by the Bankruptcy Code as follows:

27 [C]ash, negotiable instruments, documents of title, securities,
28 deposit accounts, or other cash equivalents whenever acquired in
which the estate and an entity other than the estate have an interest
and includes the proceeds, products, offspring, rents, or profits of
property and the fees, charges, accounts or other payments for the
use or occupancy of rooms and other public facilities in hotels,
motels, or other lodging properties subject to a security interest as
provided in section 552(b) of this title, whether existing before or

1 after the commencement of a case under this title
2 11 U.S.C. § 363(a). “As a general rule, postpetition revenue is not cash collateral,” and “a
3 creditor’s prepetition security interest does not extend to property acquired by the debtor
4 postpetition even if there is an ‘after acquired’ clause in the security agreement.” *Far East Nat’l*
5 *Bank v. United States Trustee (In re Premier Golf Properties, LP)*, 477 B.R. 767, 771 (B.A.P. 9th
6 Cir. 2012) (citing section 552(a)).

7 Section 552(b) of the Bankruptcy Code, referred to in section 363(a), however, provides an
8 exception to the extent “the security agreement expressly provides for an interest in such [after
9 acquired] property and the interest has been perfected under applicable nonbankruptcy law” (*Id.* at
10 772):

11 Except as provided in sections 363, 506(c), 522, 544, 545, 547, and
12 548 of this title, if the debtor and an entity entered into a security
13 agreement before the commencement of the case and if the security
14 interest created by such security agreement extends to property of
15 the debtor acquired before the commencement of the case and to
16 proceeds, products, offspring, or profits of such property, then such
17 security interest extends to such proceeds, products, offspring, or
18 profits acquired by the estate after the commencement of the case to
19 the extent provided by such security agreement and by applicable
20 nonbankruptcy law, except to any extent that the court, after notice
21 and a hearing and based on the equities of the case, orders
22 otherwise.

23 11 U.S.C. § 552(b)(1).

24 It is universally acknowledged that the debtor’s cash “is the life blood of the business” and
25 the bankruptcy court must assure that such life’s blood “is available for use even if to a limited
26 extent.” *In re Mickler*, 9 B.R. 121, 123 (Bankr. M.D. Fla. 1981). Courts typically authorize a
27 debtor to use cash collateral to continue its operations so long as the interests asserted by affected
28 creditors in such cash are adequately protected.

Absent a deposit account control agreement, a secured party does not hold a perfected
security interest in any of a debtor’s “cash on hand” or cash in deposit accounts not maintained
under the secured party’s control. “[I]mplicit in the concept of ‘cash collateral’ is that a creditor
has an enforceable security interest” in the property at issue, and a security interest in cash
requires possession. *Far East Nat’l Bank v. United States Trustee (In re Premier Golf Props.,*

LP), 477 B.R. 767, 777 (B.A.P. 9th Cir. 2012) (holding that cash receipts from golf customers constituted “money” which does not fall under the definition of a general intangible and, in turn, “did not constitute cash collateral because the creditor did not have possession of the case receipts”). *See also*, Cal. Comm. Code § 9312(b)(1) (“A security interest in a deposit account may be perfected only by control under Section 9314”), 9104(a) (setting forth conditions for “control of a deposit account”). Without possession of cash or an appropriate cash control agreement, such funds are not the Secured Parties’ cash collateral and the Debtor is free to use such funds without the need to resort to section 363(c) of the Bankruptcy Code.

As this Motion establishes, the standards for authorizing the Debtor to utilize cash collateral are satisfied in this case because JGB enjoys a sufficient equity cushion protecting its interests in any cash collateral (whatever that interest may be) based on the value of the Watermark Property and other collateral securing the JGB Loan. This alone provides more than sufficient basis for authorization of the requested use of cash collateral. In addition, the Debtor’s ongoing business operations will adequately protect and preserve the value of JGB’s interest in the cash collateral. Finally, JGB will be further adequately protected by periodic adequate protection payments as set forth in the First Budget and the grant of replacement liens as proposed in Section III.D. above.

B. Any Interest in Cash Collateral JGB Holds Will be Adequately Protected by a Substantial Equity Cushion

The Ninth Circuit Court of Appeals holds that an equity cushion alone can provide the requisite adequate protection:

Although the existence of the equity cushion is a method of adequate protection is not specifically mentioned in § 361, it is the classic form of protection for a secured debt justifying restraining of lien enforcement by a bankruptcy court.... In fact, it has been held that the existence of an equity cushion, standing alone, can provide adequate protection.... A sufficient equity cushion has been found to exist although not a single mortgage payment had been made.

Pistole v. Mellor (In re Mellor), 734 F.2d 1396, 1400 (9th Cir. 1984) (citation omitted). The Ninth Circuit defined the term “equity cushion” as “the value in the property, above the amount owed to the creditor with a secured claim, that will shield that interest from loss due to any decrease in the

value in the property during the time the automatic stay in effect.” *Id.* at 1400 n.2. An equity cushion of 10% or greater has been found sufficient to provide a lienholder with adequate protection. *See Id.* at 1401 (citing *In re McGowan*, 6 B.R. 241, 243 (Bankr. E.D. Pa. 1980) (holding that a 10% equity cushion constitutes adequate protection); *In re Rogers Development Corp.*, 2 B.R. 679, 685 (Bankr. E.D. Va. 1980) (holding that an equity cushion of approximately 15 % to 20% was sufficient adequate protection to the secured creditor).

In the instant case, JGB is adequately protected by a substantial equity cushion. As discussed above, even accepting (but not conceding) JGB’s figure for purposes of this Motion, JGB holds a claim in the amount of approximately \$6.2 million. With assets against which JGB asserts a first priority lien valued at over \$14.5 million, JGB is protected by an equity cushion of *no less than 57%*. An equity cushion of that level clearly satisfies the requisite adequate protection requirements to permit the Debtor’s use of any of JGB’s cash collateral.

C. JGB’s Interest in Cash Collateral Will be Adequately Protected Under Section 361

As noted above, a debtor’s authority to use cash collateral is typically conditioned on providing “adequate protection” to entities that assert an interest in such cash. *See* 11 U.S.C. § 361. Although the term “adequate protection” is not defined in the Bankruptcy Code, Section 361 provides the following three non-exclusive examples of what may constitute adequate protection:

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the . . . use . . . under section 363 of this title . . . results in a decrease in the value of such entity’s interest in such property.

(2) providing to such entity an additional or replacement lien to the extent that such . . . use . . . results in a decrease in the value of such entity’s interest in such property; or

(3) granting such other relief . . . as will result in the realization by such entity of the indubitable equivalent of such entity’s interest in such property.

11 U.S.C. § 361.

Neither section 361 nor any other provision of the Bankruptcy Code defines the nature and extent of “interest in property” of which a secured creditor is entitled to adequate protection under

1 section 363. However, the statute plainly provides that a qualifying interest demands protection
2 only to the extent that the use of the creditor's collateral will result in a decrease in "the value of
3 such entity's interest in such property." *United Savings Ass'n of Texas v. Timbers of Inwood*
4 *Forest Assocs., Ltd.*, 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988).

5 *Timbers* teaches that a secured creditor is entitled to "adequate protection" only against the
6 diminution in value of the collateral securing its allowed secured claim. Where the value of the
7 secured party's collateral is *not* diminishing by a debtor's use, sale, or lease, it follows that their
8 respective interests in cash collateral (if any) is adequately protected.

9 As an initial matter, as explained below, the proposed use of cash collateral enhances the
10 value of the collateral. Moreover, separate and independent of any question of diminution in
11 value, a secured creditor has no right to preservation of the equity cushion in its collateral. The
12 Supreme Court in *Timbers* determined that the property interest the Debtor must adequately
13 protect is the lien that secures the creditor's claim. *See Timbers*, 484 U.S. at 371. Further, the
14 value of the lien may not exceed the allowed amount of the secured claim. *See* 11 U.S.C. §
15 506(a)(1). Accordingly, the property interest of an oversecured creditor that a debtor must
16 adequately protect, namely the lien value, is the allowed amount of the secured claim and does not
17 include the equity cushion.

18 In *In re Alyucan Interstate Corp.*, 12 B.R. 803 (Bankr. D. Utah 1981), the court ruled that
19 an equity cushion is not a requirement of adequate protection because a secured creditor is only
20 entitled to protection against a decline in the value of its lien. The existence of an equity cushion
21 (the value of the property above the lien) is not a necessary component of adequate protection.
22 The court reasoned that section 361 speaks not in terms of preserving equity, but in terms of
23 compensating for any "decrease in the value of [an] interest in property." *Id.* at 803. The
24 Supreme Court's decision in *Timbers* confirms this interpretation of section 361. The instant case,
25 however, is one where there is equity cushion well-above the amount of its lien that provides it
26 with adequate protection and the proposed use of cash collateral to operate the Debtor's business
27 increases the equity cushion.

28 In any event, aside from any equity cushion, JGB is adequately protected by the Debtor's

1 ongoing operation and granting of appropriate replacement liens. Accordingly, JGB's claim will
2 remain adequately protected throughout the Budget period. As such pending a final hearing, the
3 Debtor requests emergency authority to use cash collateral according to the Budget during the
4 interim Budget period.

5 The Debtor proposes providing JGB with adequate protection by granting it a replacement
6 lien on cash and loan receivables from existing loans acquired post-petition, to the extent that: (i)
7 JGB's pre-petition security interests are valid, enforceable, properly perfected, and unavoidable,
8 and (ii) the Debtor's use of cash collateral results in diminution in the value of JGB's cash
9 collateral. In addition, the Debtor proposes making periodic payments to JGB pursuant to the First
10 Budget, providing it with yet another form and level of adequate protection.

11 **D. JGB's Interest in Cash Collateral Will be Adequately Protected Under Section 361**
12 **Because The Debtor's Use of Cash Collateral Will Preserve The Going Concern**
13 **Value of The Collateral**

14 It must be emphasized that the value of the Debtor's assets is primarily the value of its loan
15 receivables and the Debtor's ability to service and collect on defaulted loans. The Debtor's ability
16 to maximize the value of these assets is inextricably tied to maintaining the going concern value of
17 the Debtor's business. If the Debtor does not have access to cash, it may be forced to shut down
18 operations to the detriment of unsecured creditors and equity holders of the Debtor and JGB.
19 Accordingly, the use of cash collateral to conduct the Debtor's business will preserve and protect
20 the value of JGB's collateral generally, and enhance and maximize the potential recovery for all
21 creditors.

22 It is well established that a bankruptcy court, where possible, should resolve issues
23 presented in favor of reorganization rather than to force a liquidation because the business cannot
24 use cash or other property to operate. *See, e.g., In re Dynaco Corp.*, 162 B.R. 389 (Bankr. D. N.H.
25 1993); *In re Hoffman*, 51 B.R. 42 (Bankr. W.D. Ark. 1985); *In re A&B Hearing & Air*
26 *Conditioning, Inc.*, 48 B.R. 401 (Bankr. M.D. Fla. 1985); *In re Heatron, Inc.*, 6 B.R. 493 (Bankr.
27 W.D. Mo. 1980). As the *Heatron* court stated in granting a debtor's motion to use cash collateral:

28 The policy of the Code, as was that of the predecessor statutes, is to

1 encourage reorganization if there is a reasonable possibility of
2 success. At the beginning of the reorganization process, the court
3 must work with less evidence than might be desirable and should
4 resolve issues in favor of the reorganization, where the evidence is
5 conflicting.

6 *Id.* at 496.

7 In *In re O'Connor*, 808 F.2d 1393 (10th Cir. 1987), the court eloquently summarized the
8 foregoing principle as follows:

9 Because the ultimate benefit to be achieved by a successful
10 reorganization inures to all the creditors of the estate, a fair
11 opportunity must be given to the Debtor to achieve that end. Thus,
12 while interests of the secured creditor . . . are of concern to the court,
13 the interests of all other creditors also have bearing upon the
14 question of whether use of cash collateral shall be permitted during
15 the early stages of administration.

16 The first effort of the court must be to insure the value of the
17 collateral will be preserved. Yet prior to confirmation for a plan of
18 reorganization, the test of that protection is not by the same
19 measurements applied to treatment of a secured creditor in a
20 proposed plan. In order to encourage the Debtor's efforts in the
21 formative period prior to the proposal of a reorganization, the court
22 must be flexible in applying the adequate protection standard.

23 *Id.* at 1397-98.

24 This important sentiment is echoed in other cases. In *In re Prime, Inc.*, 15 B.R. 216, 218
25 (Bankr. W.D. Mo. 1981), the court succinctly stated that "it is not the purpose of a Chapter 11
26 proceeding to close a business at the beginning." Similarly, in *In re Shockley Forest Industries,*
27 *Inc.*, 5 B.R. 160, 162 (Bankr. N.D. Ga. 1980), the bankruptcy court explained as follows:

28 Chapter 11 is designed for the purpose of preventing dissolution of
an otherwise viable corporation. A court should not precipitously
sound the death knell for a debtor by prematurely determining that
the debtor's prospects for economic revival are poor. At this time
the Court has no basis on which to conclude the debtor cannot be
rehabilitated.

Applying the foregoing, courts have frequently allowed a debtor to use cash collateral in
circumstances where such use would enhance or preserve the debtor's reorganization value. Thus,
for example, in *In re Stein*, 19 B.R. 458 (Bankr. E.D. Pa. 1982), the court allowed a debtor to use
cash collateral where the bank was undersecured and had no cushion for protection. The court in
Stein found that the use of cash collateral was necessary to the continued operations of the debtor

1 and “the creditor’s secured position can only be enhanced by the continued operation of the
2 [debtor’s business].” *Id.* at 460. *See also, In re Pine Lake Village Apartment Co.*, 16 B.R. 750
3 (Bankr. S.D.N.Y. 1981) (marginally secured creditor adequately protected by lien in post-petition
4 property acquired by debtor; debtor can use cash collateral “in the normal course of their
5 business”).

6 The conclusion that preservation of value is sufficient, without more, to provide adequate
7 protection follows from the principle that a secured creditor is only entitled to adequate protection
8 of the secured creditor’s interest in its collateral to the extent that such collateral secured the
9 creditor’s allowed claim. *See Timbers*, 484 U.S. at 368-71.

10 Here, JGB is oversecured and protected by a sufficient equity cushion. Further, even
11 without such an equity cushion, adequate protection of JGB’s interest is present in this case since
12 the proposed use of cash collateral will preserve and protect the value of the Debtor’s business and
13 JGB’s collateral.

14 **E. Emergency Authority to Use Cash Collateral is Warranted Under Section 363(c)(3)**
15 **And Rule 4001(b) to Allow The Debtor to Operate Its Business**

16 Section 363(c)(3) of the Bankruptcy Code and Rule 4001(b)(2) of the Federal Rules of
17 Bankruptcy Procedure require the Court to schedule a cash collateral hearing in accordance with
18 the needs of the debtor and conduct a preliminary hearing for the purpose of authorizing the use of
19 cash collateral to the extent necessary to avoid irreparable harm to the Debtor. *See* 11 U.S.C. §
20 363(c)(3) (mandating that “[a]ny hearing [on the use of cash collateral] . . . shall be scheduled in
21 accordance with the needs of the debtor”). The Ninth Circuit has recognized that emergency relief
22 is often crucial to the success of a corporate reorganization:

23 We realize that “in certain circumstances, the entire reorganization
24 effort may be thwarted if emergency relief is withheld” and that
25 reorganization under the Bankruptcy Code “is a perilous process,
26 seldom more so than at the outset of the proceedings when the
27 debtor is often without sufficient cash flow to fund essential
business operations”. It is for this very reason that Congress
specified that hearings concerning the use of cash collateral “shall be
scheduled in accordance with the needs of the debtor.” 11 U.S.C. §
363(c)(3).

28 *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1449 n. 21 (9th Cir. 1985) (citations omitted).

1 In the present case, emergency use of cash collateral by the Debtor, pending a final
2 hearing, is necessary to prevent immediate and irreparable harm to the Debtor and its creditors.
3 Absent such use, the Debtor will have little or no funds from which to conduct operations, and
4 may be forced to permanently discontinue its business to the detriment of all creditors.

5 On the other hand, JGB will not suffer harm if interim relief is granted. To the extent that
6 JGB has an interest in property of the Estate which is worthy of adequate protection, that interest
7 is adequately protected by the substantial equity cushion, preservation of the value of their
8 collateral through the Debtor's continued business operations, and by the proposed replacement
9 liens.

10 As such, the Debtor requests that the Court grant the Debtor the relief requested on an
11 emergency and interim basis, followed by final approval of the Motion at a final hearing to be set
12 by the Court.

13 **V.**

14 **THE DEPOSITORY WITH WHICH THE DEBTOR BANKS AND FIRST ASSOCIATES**
15 **SHOULD BE REQUIRED TO HONOR THIS ORDER**

16 The Debtor has depository accounts with Preferred Bank (the "Depository").¹¹ In order to
17 give effect to this Court's order authorizing the Debtor's use of cash collateral, the Debtor requests
18 that the Court also direct the Depository and First Associates to comply with the order, and abide
19 by requests for use of funds by the Debtor, notwithstanding any contrary direction from JGB or
20 any other third party. *See* 11 U.S.C. § 105(a) (authorizing court to "issue any order, process, or
21 judgment that is necessary or appropriate to carry out the provisions of this title").

22 **VI.**

23 **NOTICE**

24 The Debtor intends to provide notice of this Motion by overnight mail, e-mail, facsimile,
25

26 ¹¹ Concurrently herewith, the Debtor filed an emergency first day motion to maintain certain active bank
27 accounts and its cash management system for a limited period of time to ensure a smooth transition into
28 this chapter 11 case.

1 or hand delivery on: (i) JGB; (ii) the 20 largest general unsecured creditors; (iii) First Associates;
2 (iv) the Depository; (v) the Office of the United States Trustee; (vi) any other party that requested
3 special notice; and (vi) any other party this Court orders be provided with notice of this Motion.

4 **VII.**

5 **CONCLUSION**

6 Based on the foregoing, this Court should grant the Motion.

7 Dated: December 18, 2018

SulmeyerKupetz
A Professional Corporation

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9
10 By: /s/ Asa S. Hami
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